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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 31

MASSACHUSETTS BONDING & INSURANCE CO. AND KATH-
LEEN F. CROWLEY, ADMINISTRATRIX OF THE ESTATE
OF JEREMIAH C. CROWLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. The original opinion of the Court of Appeals (R. 13-24) and the opinion on rehearing (R. 27-37) are reported at 227 F. 2d 385.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1955 (R. 24). A petition for rehearing, filed on November 30, 1955, within time duly enlarged by the Court of Appeals (R. 25), was denied on

December 15, 1955 (R. 37). The petition for certiorari, filed on February 1, 1956, was granted on March 5, 1956 (R. 38, 350 U. S. 980). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 2674(2), designed to enable ~~compensatory recovery~~ for wrongful death under the Tort Claims Act where the applicable state law provides only for punitive damages, has the additional effect of eliminating a ceiling upon death-claim recoveries established by such state law, thus permitting a recovery against the United States in this case which is three times as high as the highest award to which a private person would be liable.

STATUTES INVOLVED

1. The Federal Tort Claims Act provides in pertinent part:

a. 28 U.S.C. 1346(b).

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in

accordance with the law of the place where the act or omission occurred.

b. 28 U.S.C. 2674. *Liability of the United States.*

(1) The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

(2) If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. The Massachusetts Death Act (Mass. G.L. (Ter. Ed.) C. 229)¹ provides in pertinent part:

§ 2C. *Damages for Death by Negligence, etc.; General Provisions.*

Except as provided in sections one, two and two A,^{1a} a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who

¹ Our citations refer to the annotated edition of the Massachusetts General Laws (Ter. Ed.).

^{1a} Sections 1, 2 and 2A contain special provisions involving deaths caused by defective highways, bridges, or common carriers.

is not in his employment or service,² shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section 1.³

STATEMENT

In 1952, a contractor, P. J. Spillane, undertook to rehabilitate steel sash at the Watertown Arsenal owned and operated by the United States (R. 3, 7). The deceased, Jeremiah C. Crowley, was an employee of the contractor (R. 7). On December 22, 1952, while repairing window sashes, Crowley was struck by one of two colliding cranes. He fell to the floor and died either as the result of the blow or of the fall (R. 7-9).

² The death of an employee is governed by Section 2B.

³ Mass. G.L. (Ter. Ed.) C. 229, §1 provides in pertinent part that the action of the executor or administrator shall be brought to the use of the following persons and in the following shares:—

(1) If the deceased shall have been survived by a wife or husband and no children or issue surviving, then to the use of such surviving spouse.

(2) If the deceased shall have been survived by a wife or husband and by one child or by the issue of one deceased child, then one half to the use of such surviving spouse and one half to the use of such child or his issue by right of representation.

(3) If the deceased shall have been survived by a wife or husband and by more than one child surviving either in person or by issue, then one third to the use of such surviving spouse and two thirds to the use of such surviving children or their issue by right of representation.

(4) If there is no surviving wife or husband, then to the use of the next of kin."

In an action brought by Crowley's administratrix and Massachusetts Bonding and Insurance Co., which had paid compensation for Crowley's death (R. 4, 11), the District Court found that the collision of the two cranes had been caused by the negligence of one White, a crane operator, who was a government employee (Edgs. 5-12, R. 7-9; Concls. 4-6, R. 10).

Under the Massachusetts Death Act (*supra*, pp. 3-4), a person individually or vicariously responsible for wrongful death is "liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability" of the tortfeasor. This statute has been interpreted by the Massachusetts courts to be of a punitive nature. According to 28 U.S.C. 2674(2) (*supra*, p. 3) the United States is liable for actual or compensatory damages in those instances in which the applicable law⁴ provides only for punitive damages.

Government counsel argued (R. 5-6) that the reference in 28 U.S.C. 2674(2) to actual or compensatory damages related only to the theory pursuant to which the damages were computed and had no bearing on the limitation of the amount of damages recoverable; hence, that the Government was not precluded from claiming the benefit of the \$20,000 ceiling provided for by the Massachusetts Death Act. The District Court, however, ruled (Concl. 6, R. 10) that petitioners were entitled to compensatory damages pursuant to 28 U.S.C. 2674 and that these damages:

* * * are measurable by the pecuniary injuries resulting to those next of kin from Crowley's death;

⁴ *I. e.*, the law of the place where the act or omission complained of occurred (28 U.S.C. 1346(b), 2674(2)).

and the damages are not limited by the minimum and maximum set forth in Mass. G.L. (Ter. Ed.) C. 229 § 2C, as amended * * *

The Government appealed, raising only the question as to whether the damages recoverable against the United States were limited by the \$20,000 ceiling of the Massachusetts Death Act (R. 14). The Court of Appeals reversed (R. 24).

The court stated that the 1947 Amendment to the Tort Claims Act (now 28 U.S.C. 2647(2), *supra*, p. 3) which provided for the assessment of actual or compensatory damages against the United States where the otherwise applicable state law provides for "damages only punitive in nature" constitutes an exception to the basic theory underlying that statute, *viz.*, that the United States should be liable for the negligent or wrongful act or omission of a Government employee in the same manner and to the same extent as a private individual "under like circumstances." It noted that the amendment was motivated by a legislative fear that, in view of the prohibition against the award of punitive damages against the United States (28 U.S.C. 2674(1), *supra*, p. 3), the statute would not be operative in death action in those jurisdictions—believed to be Alabama and Massachusetts⁵—which allow only punitive damages for wrongful death (R. 17-18).

The court pointed out that while such award of punitive damages in death cases was limited to Alabama and Massachusetts, restrictions on the amount

⁵The court pointed out that this assumption was then erroneous with respect to Massachusetts which from January 1, 1947 to December 31, 1949, provided for the assessment of compensatory damages of not less than \$2,000 nor more than \$15,000 in death cases (R. 20-21, and see *infra*, fn. 21, pp. 20-21).

of recovery existed not only in Massachusetts but in about a dozen jurisdictions awarding compensatory damages," and that those ceilings were not affected either by the original act nor by the 1947 Amendment (R. 20). The court, therefore, refused to construe the 1947 Amendment, "intended to remove what was deemed to be a discrimination in a very narrow situation", in a manner which would "effectuate a far greater discrimination and incongruity" (R. 22), viz., to eliminate the ceiling on recoveries only in Massachusetts, while letting them stand in more than twelve other states. It held that 28 U.S.C. 2674(2) could not be read "literally and in isolation" (R. 22), but as "a part of 'an organic whole'" (R. 23), and that the 1947 Amendment did not indicate any objection to the maximum limit of recovery under the laws of Massachusetts or of any other jurisdiction, but merely to the assessment of damages against the United States on a punitive theory (R. 23).

The court concluded that "except where Congress has clearly provided otherwise, it is the general scheme of the Tort Claims Act to refer questions of liability of the United States to the provisions of the law of the place where the act or omission occurred" (R. 23) and that in the absence of any clear prohibition against ceilings on the recovery the pertinent state law remains applicable.

On petition for rehearing, the Court of Appeals adhered to its decision. It stressed again that it taxed its credulity to suppose that the 1947 Amendment, designed to permit recovery in death actions in Massachusetts and Alabama, should have the effect that, in

⁶ For details, see *infra*, p. 13, fn. 10.

Massachusetts alone, claimants under the Torts Claims Act would not be bound by the statutory limit on recovery (R. 29). The court also pointed out that under the Massachusetts decisions the Death Act was not considered to be exclusively punitive. While the damages were assessed on a punitive basis, the act admittedly served a compensatory purpose (R. 30).⁷ In fact during the three years that damages in death actions were assessed in Massachusetts on a compensatory basis (see fn. 5, *supra*, p. 6), they were subject to the same ceiling and floor as before and after that interlude (R. 33). The court concluded, as in the original opinion, that the sole effect of the 1947 Amendment was to provide for the assessment of damages on a compensatory basis, and that the local law remained unchanged on subjects such as the determination of who has the right to sue and on whose behalf, the effect of contributory negligence or of a release, or, as here, the imposition of ceilings on the recovery (R. 36).

SUMMARY OF ARGUMENT

I

The basic theory of the Federal Tort Claims Act is that the United States shall be liable for the wrongful acts or omissions of its employees in the same manner and to the same extent as a private individual, in accordance with the law of the place where the tort was committed. This Court has persistently refused to depart from this governing principle, in the absence of a specific congressional mandate. Here, petitioners' claim must run counter to the basic principle because

⁷ See also *infra*, pp. 20-21.

they assert that they are entitled to recover from the United States \$60,000 for a wrongful death claim governed by Massachusetts law, although under the laws of that state the liability of the tortfeasor or of his employer could not exceed \$20,000. The anomaly of this claim is highlighted by the circumstance, conceded by petitioners, that 28 U.S.C. 2674(2) (*supra*, p. 3)—the basis of their contention—leaves intact the ceilings on the recoveries in death cases in the other fourteen jurisdictions which have such restrictions. Massachusetts alone is said to have a special status.

II

The sole congressional aim which lead to the enactment of 28 U.S.C. 2674(2) was to make certain that there could be a recovery in death cases based on the laws of Alabama and Massachusetts. 28 U.S.C. 2674(2) was not a part of the original Tort Claims Act. Its enactment was prompted by the prohibition in 28 U.S.C. 2674(1) (*supra*, p. 3) against the award of punitive damages. When the Tort Claims Act became effective in 1946, two states, Alabama and Massachusetts, assessed damages in tort death cases according to the degree of culpability of the tortfeasor. In local usage these damages were called "punitive damages", although they differed in many significant aspects from punitive damages as that term is understood in federal and general law.

In the summer of 1947, Congress was advised that the District Courts in Alabama had threatened to dismiss death actions against the United States on the ground that they called for punitive damages. Unknown to Congress, the Massachusetts Death Act had been

amended—effective January 1, 1947—so as to award compensatory damages.*

Assuming that the punitive-damage exception in 28 U.S.C. 2674(1) was fatal to recovery in death cases governed by the laws of Alabama and Massachusetts, Congress added to the Tort Claims Act what is now 28 U.S.C. 2674(2). The sole reason for this amendment was stated by a member of the Committee (App., *infra*, p. 59) to be:

* * * to do right by Alabama and Massachusetts
* * * not * * * to give them a privileged status over
the other states.

The Committee reports point out that the amendment was designed to remove an "unjust discrimination never intended," to "grant to the people of two States the right of action already granted to the people of the other 46."

The purpose of the 1947 amendment thus was to bring death claims governed by the laws of Alabama and Massachusetts within the framework of the Tort Claims Act, not to create an exception from its basic theory that tort claims against the United States should be assimilated to the vicarious liability of a private employer in like circumstances.

III

A. Petitioners' contentions are based largely on the argument that the words "actual or compensatory damages, measured by the pecuniary injuries resulting from such death," in 28 U.S.C. 2674(2), mean "full

* In 1950, Massachusetts reverted to the method of assessing damages according to the degree of culpability. Alabama does not have a limit on recoveries under its Death Act.

actual or compensatory damages * * *. 28 U.S.C. 2674 (2), however, is concerned only with the measure or manner of recovery; it substitutes compensatory damages for "punitive" damages—those imposed according to the degree of culpability. It has no bearing, however, on the *extent* of the recovery, i.e., the maximum permissible recovery. Moreover, Section 4 of the Death on High Seas Act—which provides for compensatory recovery "without abatement in respect to the amount"—shows that where Congress actually seeks to eliminate ceilings on the recovery in death cases it does so expressly and unmistakably.

B. The floor and ceiling on the recovery of the Massachusetts Death Act are not so closely connected with the punitive nature of the statute that they are inconsistent with the computation of the damages on a compensatory basis. Massachusetts had the same floor and ceiling on recovery during the three years during which it awarded compensatory damages in death cases (see *supra*, pp. 6, fn. 5; 8). Moreover, fourteen states which grant compensatory damages in death cases limit the amount of the award, while Alabama which imposes "punitive damages" does not; this establishes conclusively the absence of any interrelation between limitations on and the theory of, the recovery.

C. Petitioners are not aided by the circumstance that in many fields of federal jurisdiction, especially in admiralty, there are no ceilings on recovery in death cases. The absence of limitations on death awards in admiralty goes back to the express language of Section 4 of the Death on High Seas Act. See *supra*, this page. There is no corresponding provision in the Tort Claims Act. Besides, in the Tort Claims Act Congress has

deferred to state law; general federal policies established in other fields are of no avail to petitioners.

Finally, there is no merit to petitioners' contention that Congress deliberately singled out Massachusetts and decided that its ceiling on death awards should be ignored because Massachusetts permits the award by its courts of full compensatory damages in cases governed by the law of other states. This, however, is no peculiarity of Massachusetts law; it merely represents the general conflicts rule that the forum will apply the law of the place of the tort, including the law governing the extent of the recovery. Massachusetts does not differ in this respect from the fourteen other jurisdictions placing limitations on judgments for wrongful death.

Petitioners have failed to show any valid basis for their contention that 28 U.S.C. 2674(2) was designed to depart from the fundamental theory of liability under the Tort Claims Act. Their recovery should not be allowed to exceed the highest award which could be rendered against private individuals in like circumstances.

ARGUMENT

Petitioners' claim is for wrongful death. Under the Massachusetts punitive-damage statute (*supra*, pp. 3-4), the court may award damages of no less than \$2,000 nor more than \$20,000.⁹ In spite of this limitation placed on the recovery by the state law, petitioner seeks to recover from the United States \$60,000—a sum three times the maximum which may be recovered under

⁹ We do not take any position on the question, not presented here, and not likely to be of any practical importance, whether the \$2,000 minimum placed on the recovery is also applicable to the United States in a death action. The resolution of that question, if it ever arises, should await a concrete case.

Massachusetts law from a private person. In order to support this claim petitioners must make two contentions. First, they assert that in enacting 28 U.S.C. 2674(2) (*supra*, p. 3)—providing for “actual or compensatory” damages under the Tort Claims Act in punitive-damage states—Congress deliberately and radically departed from the basic theory of the Tort Claims Act, which assimilates the liability of the United States to that of a private employer in like circumstances. Second, they claim that 28 U.S.C. 2674(2) was designed to single out Massachusetts among the fifteen jurisdictions which place limitations on recovery in death cases,¹⁰ by providing that in wrongful death actions against the United States governed by the laws of Massachusetts the statutory restrictions on the amount of the recovery have to be ignored, while such limitations remain in full effect if the claim is governed by the laws of any of the other fourteen jurisdictions.¹¹

We shall show that petitioners’ reading of 28 U.S.C.

¹⁰ The fourteen other jurisdictions are: Alaska: Compiled Laws Annotated, 1949 § 61-7-3, as amended by Laws of 1955, Ch. 153—\$50,000; Colorado: Revised Statutes, 1953, Section 41-1-3—\$10,000; Illinois: Jones Ill. Statutes Annotated, Section 38.02, as amended by Laws of 1955, H.B. 777 or 565—\$25,000 or \$20,000; Indiana: Burns Annotated Statutes, Section 2-404, as amended by Acts of 1949, Ch. 42, § 1—\$15,000; Kansas: General Statutes, 1955 Supp., § 60-3203—\$25,000; Maine: Revised Statutes, 1954, Ch. 165, § 10—\$10,000; Minnesota: Statutes Annotated, § 573.02, as amended by Laws of 1951, Ch. 697—\$17,500; Missouri: Vernon’s Missouri Statutes Annotated, § 537.090, as amended by Laws of 1955, S.B. 171—\$25,000; New Hampshire: Revised Statutes Annotated (1955), § 556:13—\$7,500-\$15,000; Oregon: Revised Statutes, 1955, § 30.020—\$20,000; South Dakota: Code (1939), 1952 Supp., § 37.2203—\$20,000; Virginia: Code 1950, § 8-636, as amended by Laws of 1952, c. 60—\$25,000; West Virginia: Code 1955, § 5475—\$10,000-\$20,000; Wisconsin: Statutes 1953, § 331-04—\$15,000-\$25,000.

¹¹ Cf. *Eastern Air Lines v. Union Trust Co.*, 221 F. 2d 62, 80-81 (C.A.D.C.), certiorari denied *sub nom. Union Trust Co. v. United States*, 350 U.S. 911, in which the Virginia limitation was observed.

2674(2) contravenes the basic theory of the Tort Claims Act; that it is in conflict with the specific purpose Congress sought to accomplish when it enacted 28 U.S.C. 2674(2); and that it does not find any support in the statutory language or context.

I

In the Absence of Specific Congressional Mandate, There Should Be No Departure from the Basic Theory of the Tort Claims Act Under Which the Liability of the United States Is Assimilated to that of a Private Employer.

The basic theory under which the United States assumed responsibility in tort is that the United States is liable pursuant to the rules of *respondent superior* for the acts and omissions of its employees in the same manner and to the same extent as a private individual in like circumstances, in accordance with the law of the place where the alleged tort was committed. 28 U.S.C. 1346(b), 2674(1); *Feres v. United States*, 340 U.S. 135, 141; *United States v. Brown*, 348 U.S. 110, 112; *Williams v. United States*, 350 U.S. 857; *United States v. Campbell*, 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957. Accordingly, under this fundamental theory of responsibility, the liability of the Government cannot exceed that of the actual tortfeasor, or that of his employer. Under Massachusetts law the liability of either of these cannot surpass the sum of \$20,000.

This Court has been vigilant in checking any inroads into these fundamental principles of governmental liability under the Tort Claims Act. It has uniformly resisted governmental claims for exemption from liability to which a private employer in like circumstances would have been subjected, unless it has considered that

the asserted exception was based upon the express language of the statute or followed from it by necessary implication. *Brooks v. United States*, 337 U.S. 49, 51-53; *United States v. Aetna Surety Co.*, 338 U.S. 366, 383; *United States v. Yellow Cab Co.*, 340 U.S. 543, 550, 554; *United States v. Brown*, 348 U.S. 110, 112-113. *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69.

The rationale of these decisions is not, as petitioners seem to contend, a mechanical rule that the Tort Claims Act is always to be construed liberally in favor of the claimant, but rather that departures from the basic rule of governmental liability, as set forth in the Tort Claims Act, are not readily to be countenanced. In other words, while the rigor of the doctrine of sovereign immunity is not to be preserved by subjecting the Government's consent-to-be-sued to restrictive refinements,¹² neither is profligacy to be promoted by over-generous or careless construction.¹³

Petitioners claim that 28 U.S.C. 2674(2) entitles them to a recovery three times as high as that to which the actual tortfeasor and his employer, were he a private person, could be subjected in Massachusetts. This anomalous result is at least *prima facie* suspect because it departs from the fundamental theory of the Tort Claims Act, destroying its symmetry; in addition, the result is not in accord either with the special congressional purpose which lead to the enactment of 28 U.S.C. 2674(2), nor with the statutory language.

¹² *United States v. Aetna Surety Co.*, 338 U.S. 366, 383; *United States v. Yellow Cab Co.*, 340 U.S. 543, 554; cf. *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147.

¹³ *Indian Towing Co. v. United States*, 350 U.S. 61, 69.

II

The Sole Legislative Purpose Which Motivated the Enactment of 28 U.S.C. 2674(2), Providing for Compensatory Damages Where the State Wrongful-Death Act Is Punitive, Was to Permit Recovery for Wrongful Death in Alabama and Massachusetts in Which Only Punitive Damages Can Be Awarded for Such Claims.

This case involves the interpretation, *i.e.*, the determination of the meaning,¹⁴ of 28 U.S.C. 2674(2) which originally was enacted in 1947 as an amendatory proviso (61 Stat. 722) to 28 U.S.C. 2674(1), then Section 410(a) of the Tort Claims Act. (60 Stat. 843, 28 U.S.C. (1946 Ed.) 931). In our view, an examination of the events which lead to the enactment of 28 U.S.C. 2674(2) is indispensable to a proper understanding of that subsection.

A. The Effect of 28 U.S.C. 2674(1), prohibiting the award of punitive damages under the Tort Claims Act, Upon Death Cases Governed by Statutes Providing for Recovery According to the Culpability of the Tortfeasor.

1. 28 U.S.C. 2674(1). According to 28 U.S.C. 2674(1) (*supra*, p. 3), the United States is liable on tort claims "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable * * * for punitive damages." (Emphasis added). As defined by this Court,¹⁵ punitive or

¹⁴ Frankfurter, *Some Reflections on the Reading of Statutes*, (1947) 47 Columbia Law Review 527, 533.

¹⁵ Inasmuch as the award of punitive damages constitutes an exception to the coverage of the Tort Claims Act, the definition of the term appears to be determined by federal or general law. A state cannot be permitted to circumvent or to broaden the intended exception through the medium of an unusual definition. *Stepp v. United States*, 207 F. 2d 909, 911 (C.A. 4), certiorari denied, 347 U.S. 933; *Missouri Pacific R.R. Co. v. Ault*, 256 U.S. 554, 565.

exemplary damages constitute an award *added* to compensatory damages where the defendant had acted intentionally or in a wanton, malicious, or outrageous manner. They are not granted in the case of a mere negligent tort. *Day v. Woodworth*, 13 How. 363, 371; *Lake Shore, etc. Ry. Co. v. Prentice*, 147 U.S. 101, 107; *Scott v. Donald*, 165 U.S. 58, 86.¹⁶

The only instance in the long and complicated history of the Tort Claims Act (see *Dalehite v. United States*, 346 U.S. 15, 24-30) where an explanation of the term punitive damages is given, indicates that this is the sense in which the term was understood by Congress.¹⁷ At the Hearings conducted before the House Judiciary Committee during the Second Session of the 77th Congress, Assistant Attorney General Shea¹⁸ testified:

¹⁶ This definition of the term punitive damages agrees with the general law. *Restatement of the Law of Torts*, Section 908; Sedgwick, *Damages* (9th Ed., 1912), Sections 357, 363; Prosser, *Handbook of the Law of Torts* (2d Ed.), pp. 9-10; McCormick, *Handbook on the Law of Damages*, pp. 275, 280.

¹⁷ The prohibition against punitive damages appeared for the first time in S. 2690 and H.R. 7236, 76th Cong., 1st Sess. These two bills had been drafted in the Department of Justice and submitted, at the request of Attorney General Murphy, by Senator Ashurst and Representative Celler. See *Annual Report of the Attorney General of the United States for the Fiscal Year ended 1939*, p. 8 and Holtzoff, *Tort Claims against the United States*, 25 Am. Bar Asso. Journ. 828, 831. cursory references to the prohibition against the award of punitive damages appear frequently, see, e.g., H. Rept. 2428, 76th Cong., 3rd Sess., p. 4; H. Rept. 2245, 77th Cong., 2d Sess., p. 9; H. Rept. 1287, 79th Cong., 1st Sess., p. 4; S. Rept. 1400, 79th Cong., 2d Sess., p. 32; Legislative Reorganization Act of 1946, House of Representatives, 79th Cong., 2d Sess., Committee Print, p. 37. The Tort Claims Act was enacted during the Second Session of the 79th Congress as Part IV of the Legislative Reorganization Act.

¹⁸ As this Court pointed out in *United States v. Suelar*, 338 U.S. 217, 220, fn. 9, "the shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress." The Court has frequently relied on the testimony

And we think it is enough to satisfy the actual claim, rather than impose punitive damages on the United States.¹⁹

Mr. Shea thus envisaged punitive damages as damages *added* to the conventional compensatory damages and thought that the Government should not be saddled with that extra liability.

This prohibition against the award of punitive damages is not based on fiscal considerations alone; it also represents, we believe, a codification of the federal rule established in *Lake Shore, etc. Ry. Co. v. Prentice*, 147 U.S. 101, which holds that a vicariously liable master can be held responsible for punitive damages only if he had ratified or approved the intentional, wilful, wanton or outrageous act of his servant.²⁰ The possibility of such approval or ratification by the United States of the aggravation of a tort is hard to conceive, and in any event the Tort Claims Act was not designed to protect against intentional or wilful injuries. The rule against the award of punitive damages also suggests the related thought that the liability of the United States is not to be enhanced according to the type of fault of the Government employee. Indeed, 28 U.S.C. 2680(h) discloses the countervailing policy of completely exempting the United States from liability in many of

given by Mr. Shea during these hearings. See *United States v. Spelar*, 338 U.S. 217, 221; *Dalehite v. United States*, 346 U.S. 15, 27-30; *United States v. Gilman*, 347 U.S. 507, 511, fn. 2.

¹⁹ Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463, Serial No. 13, p. 30.

²⁰ The federal rule has been adopted in many jurisdictions. See *Restatement of the Law of Torts*, Section 909; Prosser, *Handbook of the Law of Torts* (2d Ed.), pp. 11, 350, fn. 1; McCormick, *Handbook on the Law of Damages*, p. 282.

the instances of intentional torts in which punitive damages are most commonly awarded.

2. *The anomalous death statutes of Massachusetts and Alabama.* The administration of the punitive-damage exception of 28 U.S.C. 2674 was complicated by the circumstance that in two states, Massachusetts and Alabama, unusual methods prevail for the computation of damages in death cases and, in addition, that those two jurisdictions do not use the term "punitive damages" in the way in which these words are commonly applied.

The Massachusetts Death Act (*supra*, pp. 3-4) provides that if a person by his own negligence or his own wilful, wanton or reckless act or that of his agent or servant causes the death of another person, he shall be liable in damages. The statute prescribes a floor and a ceiling for those damages, and, except for the three-year period from January 1, 1947 to December 31, 1949, these damages have been assessed with reference to the degree of culpability of the defendant or his agents or servants.²¹ The damages thus are computed without

²¹ In 1943, a Special Commission to study the Method of Assessing Damages in Actions for Death recommended that damages in death cases should be based on the principle of compensation for the pecuniary loss sustained (Mass. Legislative Document, 1943, Senate No. 430). Presumably on the basis of that report, the Massachusetts Legislature amended the death Act in 1946 (Acts of 1946, Ch. 614), effective January 1, 1947, so as to provide for damages of not less than \$2,000 nor more than \$15,000, to be assessed with reference to the degree of culpability of the wrongdoer as well as to the pecuniary loss of the surviving spouse, children or next of kin. In order to remedy the confusion resulting from the two concurrent measures of damages, the act was amended in 1947 (Acts of 1947, Ch. 506), and made retroactively effective as of January 1, 1947 (Section 3), so as to eliminate the reference to the culpability of the wrongdoer. The provisions for a \$2,000 floor and a \$15,000 maximum, however, were retained. For the opera-

reference to the loss suffered either by the decedent's estate or his dependents, but solely on the basis of the tortfeasor's culpability which, according to the language of the Act, may extend from negligence to wilfulness.

The damages recoverable under the Massachusetts Death Act differ from the federal and general definition of punitive damages in two important aspects. First, true punitive damages are never awarded for the commission of a purely negligent tort; they presuppose an element of aggravation, *viz.*, outrageous, wilful, wanton, or malicious conduct. Cf. *supra*, pp. 16-17. The Massachusetts statute imposes liability for the negligent causation of death. Second, punitive damages, as the term is understood generally, are imposed in addition to, not in lieu of, compensatory or nominal damages. Cf. *supra*, pp. 16-17. The damages awarded under the Massachusetts statute are based exclusively upon the culpability of the wrongdoer. There are no basic compensatory damages to which punitive damages may be tacked.

Nevertheless, under the terminology prevailing in Massachusetts, the damages assessed under its Death Act are called "punitive"²² on the ground that the re-

tion of this compensatory statute see *Beatty v. Fox*, 328 Mass. 216. As the result of Acts of 1949, Ch. 427, effective January 1, 1950, Massachusetts reverted to its traditional method of computing damages with reference to the culpability of the wrongdoer. The \$2,000 and \$15,000 limits were retained. *Massachusetts Law Quarterly*, October 1949, p. 3. See also *Turcotte v. DeWitt*, 124 N.E. 2d 241, 244 (Mass.). The ceiling on the recovery was raised to \$20,000 in 1951. Acts of 1951, Ch. 250.

²² When the Massachusetts courts call the damages recoverable under the Death Act "punitive" they probably use that term in the sense that the statute is penal or calls for a penalty. According to federal law (*supra*, p. 17, fn. 18), however, a statute is

covery, as in criminal cases, varies according to the fault of the wrongdoer. The greater the fault the greater has been the sum recovered." *Boott Mills v. Boston & Maine Railroad*, 218 Mass. 582, 584; see also *Porter v. Sorell*, 280 Mass. 457, 460; *Arnold v. Jacobs*, 316 Mass. 81, 84.²³ On the other hand, as the court below pointed out (R. 30), many of the Massachusetts decisions are fully aware of the strong compensatory aspects of the Death Act. *Sullivan v. Hustis*, 237 Mass. 441; *Putnam v. Savage*, 214 Mass. 83; see also *Macchiaroli v. Howell*, 294 Mass. 144, 146-147 and *Arnold v. Jacobs*, 316 Mass. 81, 84.

The Alabama wrongful death statute, the Homicide Act (Alabama Code (1940), Title 7, § 123), provides for the recovery of "such damages as the jury may assess." The Alabama courts have interpreted this section as designed to preserve human life—not to compensate the survivors—and that the damages awarded

usually called penal only if it provides for an exaction designed to punish an offense against the public justice of the State and does not include damages, whether enhanced or not, which are payable to the injured person. *Huntington v. Attrill*, 146 U.S. 657, 673-674, 683; *Brady v. Daly*, 175 U.S. 148, 156; *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 397; *Helvering v. Mitchell*, 303 U.S. 391, 401-406; *Marcus v. Hess*, 317 U.S. 537; *Rex Trailer Co. v. United States*, 350 U.S. 148. Since the recovery under the Massachusetts Death Act goes to the family of the deceased, the persons presumably injured by the tort, the statute is not even technically penal in the normal federal sense. Cf. *Boston & Maine R.R. v. Hurd*, 108 Fed. 116, 119-123 (C.A. 1); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 102-106; *Hill v. Boston & Maine R.R.*, 77 N.H. 151; *Daury v. Ferraro*, 108 Conn. 386, holding that the Massachusetts Death Act is not penal in the international sense. See also Beale, *Treatise on the Conflict of Laws*, Section 611.2.

²³ In *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 105, Carlozo, J., suggested that, this emphasis may be due to the circumstance that the common law of Massachusetts does not award punitive or exemplary damages even for malicious torts. Cf. *Boott Mills v. Boston & Maine R.R.*, 218 Mass. 582, 589.

are punitive in nature, to be assessed according to the culpability of the wrongdoer. *Southern Ry. Co. v. Sherrill*, 232 Ala. 184, 193; *Louisville & Nashville R.R. Co. v. Davis*, 236 Ala. 191, 198; *Jack Cole, Inc. v. Walker*, 240 Ala. 683; *Constitution Pub. Co. v. Dale*, 164 F. 2d 210, 213-214 (C.A. 5).²⁴

Possibly the most spectacular and least foreseeable consequence of this stress placed by the courts of Alabama and Massachusetts upon the punitive aspects of their Death and Homicide Acts occurred after World War I. Both states took the position that their death statutes were of a penal nature, and that actions for wrongful death resulting from the federal operation of the railroads, although maintainable in all other states, could not be brought in their jurisdictions under the rule of *Missouri Pacific R.R. Co. v. Ault*, 256 U.S. 554, 564. *Arruda v. Director General of Railroads*, 251 Mass. 255; *Howard v. Davis*, 209 Ala. 113, 114.²⁵

²⁴ Cf., however, the analysis by this Court of the Alabama Homicide Act in *Pizitz Co. v. Yeldell*, 274 U.S. 112.

²⁵ The Massachusetts court conceded that in all likelihood "the exclusion of the United States in its operation of railroads from liability like that sought to be enforced in the present action was an oversight or unintentional. We cannot supply a *casus omissus*". 251 Mass. at 263. The Supreme Court of Alabama also decided to stress the penal aspects of its Homicide Act, and concluded "we must bow to the highest authority in deciding federal questions, and 'Render, therefore, unto Caesar the things which are Caesar's'." *Howard v. Davis*, 209 Ala. 113, 114. The Supreme Court of Missouri, however, was less overawed by the particular character of the remedy contained in its Railroad Death Statute. Until its repeal in 1955, that statute (Vernon's Annotated Missouri Statutes §537.070) provided that where death has been caused by the negligence of a railroad or similar public conveyance it "shall forfeit and pay as a penalty . . . the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury." The court did not consider decisive the extremely penal-sounding language of the statute (cf. *Marcus v. Hess*, 317 U.S.

B. *The Enactment of 28 U.S.C. 2674(2).*

After the adoption of the Tort Claims Act, several United States Attorneys, relying on the local usage of the term "punitive damages" in Alabama and Massachusetts,²⁶ moved to dismiss death actions brought in those two jurisdictions against the United States.²⁷ The Department of Justice agreed that it was desirable to obtain judicial clarification by testing the scope of the exemption of the United States from punitive damages.

When Congress was advised of this controversy, two

537, 551; *Atchison, T. & S. F. Ry. Co. v. Nichols*, 264 U.S. 348, 350-352, nor the alleged "purely penal" aspects of the statute, but found that it contained sufficient compensatory elements to permit a recovery against the Director General of Railroads. *McDaniel v. Hines*, 292 Mo. 401, 415-419.

²⁶ The adoption of a compensatory death statute in Massachusetts (*supra*, p. 19, fn. 21) did not entirely moot the issue as far as that state was concerned. That statute covered deaths occurring after January 1, 1947 (p. 19, fn. 21). The Tort Claims Act, however, is applicable to claims accruing on or after January 1, 1945 (28 U.S.C. 1346(b)). Thus, the problem remained alive with respect to deaths occurring during that two-year interval, and it resumed its importance when Massachusetts returned to its old method of assessing damages in death cases, on January 1, 1950.

²⁷ Petitioner has stated that the Railroad Death Statutes of Colorado, Missouri and New Mexico raise analogous problems. The Missouri and New Mexico Statutes (Vernon's Annotated Missouri Statutes, §537.070 and New Mexico Stat. Ann. (1953), §22-20-4) have both been construed as being of a compensatory nature. *McDaniel v. Hines*, 292 Mo. 401; *Atchison, T. & S. F. Ry. Co. v. Nichols*, 264 U.S. 348. Moreover, the Missouri statute was repealed in 1955. The New Mexico statute was amended in the same year and now provides for "damages compensatory and exemplary" without any limitation in amount. With respect to the Colorado statute (Colorado Rev. Stats. 1953, §41-1-1), see *Hopper v. Denver & R.G.R. Co.*, 155 Fed. 273 (C.A. 8), pointing to the fact that the Colorado statute was derived from the Missouri legislation—later interpreted as being compensatory in nature, see *supra*,—and hinting strongly that the Colorado statute was compensatory, at least in the international law sense (cf. the citations at 155 Fed. 277-278).

bills were immediately introduced in the House of Representatives. H.R. 3668, 80th Cong., 1st Sess., proposed to add a proviso to Section 410(a) of the original Tort Claims Act (now 28 U.S.C. 2674(1)) to the effect that where in death cases the applicable state law provided only for punitive damages the United States should be liable for such damages.²⁸ H.R. 3690 was more radical; it proposed to repeal altogether the prohibition against the award of punitive damages.

Hearings were held on these bills before a Subcommittee of the House Judiciary Committee, to which the members of the Congressional delegations from Alabama and Massachusetts were invited.²⁹ During a discussion of the Massachusetts law, it was pointed out that the Massachusetts Death Act has been construed to be punitive in some aspects and compensatory in others (App., *infra*, pp. 46, 48, 52); it was also disclosed that the Act provided for a maximum recovery (App., *infra*, pp. 45, 55).³⁰

As to the merits, it was fully recognized that Congress had not intended to preclude governmental liability in death cases governed by the laws of Alabama and Massachusetts (App., *infra*, pp. 36, 41, 44, 50, 53, 55). Some Congressmen indicated that Alabama apparently used the term "punitive damages" in an entirely different way from Congress when it enacted 28

²⁸ A spokesman for the Department of Justice favored the adoption of this bill (App., *infra*, p. 49). A similar bill was introduced in the Senate, S. 1224, 80th Congress, 1st Session.

²⁹ The hearings were not printed. Pertinent excerpts may be found in the Appendix, *infra*, pp. 35-60.

³⁰ The Committee was not advised of the 1946 and 1947 amendments to the Massachusetts Death Statute (see *supra*, p. 19, fn. 21) which had changed the theory of recovery from punishment to compensation (App., *infra*, pp. 45-48). See also the statement of Representative Lane, *infra*, at App. 53.

U.S.C. 2674 (App., *infra*, pp. 41, 50). While there was agreement that the situation should be remedied, there was some hesitancy to make the United States liable for punitive damages (App., *infra*, pp. 43-44, 54, 56), and it was pointed out by Rep. Gwynne, the Chairman of the Subcommittee, that an employer's vicarious liability ordinarily is limited to compensatory damages (App., *infra*, pp. 43-44).

At this juncture, a representative of the General Accounting Office suggested an amendment to H.R. 3668 which would resolve the conflicting considerations. He recommended that, where the applicable law provided punitive damages in the case of wrongful death, the United States should be liable for actual or compensatory damages in lieu thereof. App., *infra*, pp. 56-57. This recommendation constitutes the basis of the present 28 U.S.C. 2674(2).³¹ At the end of the hearings, Congressman Bryson summed up the consensus of the Committee by stating (App., *infra*, p. 59):

We want to do right by Alabama and Massachusetts, but we do not want to give them a privileged status over the other states.

The pertinent Committee reports reflect the same considerations. H. Rept. 748, 80th Cong., 1st Sess.; S. Rept. 763, 80th Cong., 1st Sess. They state that the purpose of the prohibition against the award of punitive damages was to limit the liability of the United

³¹ The Senate Committee (S. Rept. 763, 80th Cong., 1st Sess.) clarified this formula by specifying that these actual or compensatory damages should be measured by the pecuniary injuries suffered by the survivors, i.e., not by the loss to the decedent's estate, an alternate method of computing damages in death cases. Cf. McCormick, *Handbook on the Law of Damages*, 337-345; *Development in the Law of Damages, 1935-1947*, 61 Harvard L. Review 113, 167. *Heath v. United States*, 85 F. Supp. 196, 199 (N.D. Ala.).

States to compensation for the loss actually suffered rather than to punish for the culpability of the tort and that, unexpectedly, this congressional purpose had resulted in "inequity" in death cases governed by the laws of Alabama and Massachusetts, because in those states the death statutes had been construed as being punitive in nature. The reports explain that it was ~~the~~ purpose of the proposed bill to remove that "inequity" by amending

* * * the Federal Tort Claims Act so that it shall grant to the people of two States the right of action already granted to the people of the other 46.

The reports conclude that the proposed bill would not authorize the infliction of punitive damages against the Government but that its

* * * passage will remove an unjust discrimination never intended, but which works a complete denial of remedy for wrongful homicide.

The scope of the 1947 amendment to the Tort Claims Act was thus limited to the apparent conflict between the prohibition in 28 U.S.C. 2674(1) against the award of punitive damages against the United States and the classification of death awards as punitive in Massachusetts and Alabama.³² Its purpose was to permit

³² Parenthetically, it may be questioned whether the enactment of 28 U.S.C. 2674(2) was really necessary. The courts could have held that the prohibition against punitive damages was not aimed at denying relief to claims based on Alabama or Massachusetts law, especially since the damages assessed in those jurisdictions were not punitive in the federal sense. See *supra*, pp. 24-25, and see the remarks of Congressmen Gwynne and Walter, App., *infra*, pp. 41, 50. On the other hand, Congress was faced with a degree of urgency. At least one district judge in Alabama had indicated that he would dismiss a death action brought against the United States (App., *infra*, p. 50; see also pp. 39, 49).

recovery in death actions governed by the laws of Alabama and Massachusetts and thus to prevent a repetition of the unfortunate situation which prevailed in Alabama and Massachusetts after World War I (see *supra*, p. 22).

On the other hand, there is no indication that Congress sought to nullify, in cases arising under the Tort Claims Act, the Massachusetts limitation on the amount of recoveries, of which the Committee had been advised (App., *infra*, pp. 55, 45-46). Representative Bryson's statement (*supra*, p. 25):

We want to do right by Alabama and Massachusetts, but we do not want to give them a privileged status over the other states.

and the committee reports, stating that the sole purpose of the bill was to remove "an unjust discrimination, never intended," both belie petitioners' theory that Congress deliberately and carefully eliminated the ceiling on the amount of the recovery in Massachusetts death cases, thereby exposing the United States to liability far in excess of that of a private individual in like circumstances, while leaving those ceilings in effect in the remaining fourteen jurisdictions which have similar restrictions but provide for compensatory damages.

III

Having Been Enacted for the Sole Purpose of Enabling Recoveries in Death Cases Governed by the Laws of Alabama and Massachusetts, 28 U.S.C. 2674(2) Neither Provides for, Nor Requires, the Disregard of State Limitations upon the Amount Recoverable.

Petitioners' basic position is that the wording of 28 U.S.C. 2674(2) requires that the limitation on the

amount of recovery contained in the Massachusetts Death Act be disregarded in an action brought under the Federal Tort Claims Act. We have shown that this result is irreconcilable with the specific purpose of the provision as revealed by the legislative history. This inquiry into legislative history was highly pertinent, and indeed required in a case of this character. This Court has often recognized that it is imperative in view of the "disorderly conduct of words"³³ to determine whether the statutory language actually represents the legislative purpose and meaning.³⁴ Apart from this, moreover, petitioners' theories are not supported by the statutory terms in their context.

A. 28 U.S.C. 2674(2) refers only to the Measure of Damages, Not to the Extent of the Recovery.

To recall its terms, 28 U.S.C. 2674(2) provides that where, according to the applicable law, damages only punitive in nature are awarded in death cases, the United States shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons for whose benefit the action was brought in lieu thereof. Petitioners read this section as if it were worded "full actual or compensatory damages" or "actual or compensatory damages without abatement" in respect to the amount for which recovery is authorized." (Emphasis added).³⁵

³³ Chafee, *The Disorderly Conduct of Words*, (1941) 41 Columbia Law Review 281.

³⁴ *United States v. American Trucking Associations*, 310 U.S. 534, 543, 544; *United States v. Dickerson*, 310 U.S. 554, 561-562; *United States v. Fisher*, 2 Cranch 358, 386, see also the dissenting opinion of Frankfurter, J. in *Kneuff v. Shaughnessy*, 338 U.S. 537, 548, and Frankfurter, *supra*, p. 16, fn. 14 at 528, 536, 537-544.

³⁵ Cf. Death on High Seas Act, Section 4, 41 Stat. 537, 46 U.S.C. 764, which uses the latter expression. See *infra*, p. 32.

This argument, however, ignores the cardinal fact that the damage clause of the Massachusetts Death Act contains two separate elements: (1) the theory upon which the recovery is based, *i.e.*, the measure of damages or the *manner* of liability, and (2) the maximum recovery, *i.e.*, the *extent* of the recovery. Other death statutes make similar distinctions between those two factors.³⁶ New Hampshire, indeed, highlights this dichotomy by assigning separate code sections to those two elements.³⁷

28 U.S.C. 2674(2) is concerned only with the theory or *manner* of recovery, *i.e.*, the subsection substitutes compensatory for punitive damages. It leaves undisturbed all other aspects of the state law—including the *extent* of the recovery, the maximum permissible recovery. As we have seen, this reading of the statute is fully supported by the legislative history of the Tort Act and by the purpose which the 1947 Amendment was designed to serve. Moreover, it is plain from the Death on High Seas Act that Congress knows well how to express itself where it actually seeks to eliminate restrictions on the amount of recovery. See fn. 35, *supra*, p. 28; *infra*, p. 32.

B. The Change of the Theory of Recovery Does Not Require the Elimination of the Ceiling on the Recovery.

Petitioners take the position that the \$20,000 ceiling, especially in its combination with the \$2,000 minimum

³⁶ See, *e.g.*, Laws of Alaska, 1955, Ch. 153, amending Alaska Compiled Laws Annotated, 1949, § 6F-7-3; Maine Revised Statutes, 1954, Ch. 165, §10; Minnesota Statutes Annotated, §573.02, as amended by Laws of 1951, c. 697, § 1 and Laws of 1955, c. 407, §1.

³⁷ New Hampshire Rev. Stat. Ann. (1955), §556:12, and §556:13.

recovery, is so closely connected with the punitive character of the statute that it is inconsistent with the award of damages on a compensatory basis. The obvious answer to the argument that ceilings and minima on tort judgments are inconsistent with a compensatory theory of recovery is furnished by the example of Massachusetts itself. During the three years during which damages in that state were awarded *with reference to the pecuniary loss of the survivors, i.e.,* on a compensatory basis, judgments for wrongful death were subject to the same ceiling and floor as before and after that time, when recovery was of a punitive nature.³⁸

The former Missouri Railroad Death statute, which was construed by the Supreme Court of Missouri to be at least in part compensatory, also contained a floor and ceiling on recovery. See *supra*, p. 22, fn. 25. Most instructive is the decision in *Atchison, T. & S. F. Ry Co. v. Nichols*, 264 U.S. 348, arising under the former New Mexico statute (see *supra*, p. 23, fn. 27), under which a railroad responsible for wrongful death:

* * * shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, * * *

This Court held that the New Mexico statute was compensatory, in spite of the limitation of the recovery to the flat sum of \$5,000. It pointed out that this feature of the statute constituted a legislative definition of the damages in view of (264 U.S. at 352):

* * * the incapability of precise accuracy being attained either by court or jury of the damages

³⁸ Cf. *supra*, p. 10, fn. 2; see also *Beatty v. Fox*, 328 Mass. 216.

that may result from the death of a person to surviving relatives.

The \$2,000-\$20,000 bracket provided by the Massachusetts legislature presumably prescribes similar guidance.³⁹

The total lack of correlation between limitations on the extent of damages and the theory of recovery is demonstrated by the contrast between the fourteen jurisdictions which award compensatory damages for wrongful death, and also impose limits on the amount of the recovery,⁴⁰ with the punitive damages awarded in Alabama which are not subject to any floor or ceiling. Our conclusion is that limitations on the amount of recovery are not so close an attribute of punitive damages that they must have fallen when Congress changed the theory of recovery for torts committed by the Federal Government in Massachusetts.⁴¹

³⁹ As to some Massachusetts decisions which seek to infer the quasi-criminal character of the Massachusetts Death Act from the very existence of limitations upon the assessable damages (cf., e.g., *Porter v. Sorell*, 280 Mass. 457, 461; *Arnold v. Jacobs*, 316 Mass. 81, 84), see in general the warning of Cardozo, J., in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 104-106, against placing too much trust on the "undue" emphasis put by the Massachusetts courts on the penal elements of their Death Act.

⁴⁰ *Supra*, p. 13, fn. 10.

⁴¹ Nor can it be said that there is anything inherently punitive about the amount of the \$20,000 ceiling of the Massachusetts Death Act. To the contrary, it is well within the range of the maximum recoveries existing in the fourteen compensatory damage jurisdictions (*supra*, p. 13, fn. 10).

C. The Absence of Limitations on the Amount Recoverable for Wrongful Death in Admiralty Does Not Support Petitioners' Interpretation of 28 U.S.C. 2674(2).

Petitioners, finally, take the position that their thesis is in accord with a supposed federal policy against limitations on the amount of the recovery in death cases, manifested especially in the field of admiralty. The absence of ceilings on death claims in maritime and related cases, however, is based upon the express clause of Section 4 of the Death on High Seas Act (41 Stat. 537, 46 U.S.C. 764) that recovery may be had "without abatement in respect to the amount for which recovery is authorized". Such language is conspicuously missing from 28 U.S.C. 2674(2). See *supra*, p. 28. Moreover, under the Tort Claims Act, the United States has deferred to the law of the place where the tort was committed, *i.e.*, to state law, and general federal policies in other fields and established for other purposes are not controlling or even helpful.⁴²

Petitioners also seek to buttress their position by claiming that Congress deliberately abrogated the limit on recovery in Massachusetts death cases because, they say, that state has no general public policy against the award of unlimited compensatory damages for wrongful death; its courts award full compensatory damages in cases governed by the laws of other states. This

⁴² Actually, petitioners' argument proves too much. It could be argued with the same justification that under the Tort Claims Act the rule of contributory negligence is inapplicable because the rule of comparable negligence prevails generally in admiralty and has been adopted expressly in the Federal Employers Liability Act, Section 3, 35 Stat. 66, 45 U.S.C. 53, and consequently in the Jones Act (41 Stat. 1007, 46 U.S.C. 688).

argument would be valid only if this Massachusetts rule were unique, and if the fourteen other jurisdictions which limit their awards in death cases — which limitations are fully effective under the Tort Claims Act — would apply their ceilings on recoveries to death cases based upon the laws of other states. Actually, however, the Massachusetts law merely represents the prevailing conflicts rule that in an action for wrongful death the forum will apply the law of the place where the tort was committed, including the governing limitations, if any, on the amount of the recovery. *Northern Pacific Railroad v. Babcock*, 154 U.S. 190, 196-199; *Stoff v. Burlington Transportation Co.*, 178 F. 2d 541, 545 (C.A. 10), certiorari denied, 339 U.S. 929; 191 F. 2d 915, 917; *Zirkelbach v. Decatur Carriage Co.*, 119 F. Supp. 753 (N.D. Ind.); *Barnes v. Union Pacific R.R. Co.*, 139 F. Supp. 198, 200 (D. Idaho); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 108-112; *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116, 130; *Restatement of the Law of Conflicts of Laws*, Section 417; see also Annotation, 15 A.L.R. 2d 762, 765-767.

Petitioners thus have been unable to give any plausible explanation for their contention that the congressional aim to remove an unintended discrimination against Alabama and Massachusetts (see *supra*, pp. 24-26) had the additional effect of singling out Massachusetts by permitting in that jurisdiction — and in that jurisdiction alone — a recovery against the United States much higher than the one to which the actual tortfeasor and his employer (if he were a private person) could be subjected.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,

Solicitor General.

GEORGE COCHRAN DOUB,

Assistant Attorney General.

PAUL A. SWEENEY,

HERMAN MARCUSE,

Attorneys.

SEPTEMBER 1956.

APPENDIX

HEARINGS ON H. R. 3668 AND 3690, 80TH CONGRESS⁴³

A Bill to amend the Federal Tort Claims Act

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE No. 2⁴⁴

Wednesday, June 11, 1947.

The Subcommittee met at 10:00 o'clock, Honorable John W. Gwynne, Chairman, presiding.

Mr. GWYNNE: The Subcommittee will be in order, please.

We are considering today several bills having to do with amendments to the Tort Claims Act. They are H.R. 3690, H.R. 3668. In addition, we have H.R. 42, on a slightly different suggested amendment.

* * * * *
STATEMENT OF THE HONORABLE SAM HOBBS,
REPRESENTATIVE FROM ALABAMA

Mr. Hobbs: Mr. Chairman, I am not unmindful of the fact that when I asked you to grant us a hearing at the earliest possible moment, I promised not to take over ten minutes for [p. 2] this whole issue. So I will try to be as brief as I can.

Mr. Grant has a bill, H.R. 3668, which will serve the needs of Alabama and Massachusetts all right, because it is limited to them by its terminology; whereas my

⁴³ These hearings were not printed. A typewritten copy is in the custody of the Judiciary Committee of the House of Representatives.

⁴⁴ This Subcommittee was composed of Representative Gwynne, Chairman, and Representatives Case, Walter, Bryson and Lane, Members. United States Code Congressional Service, 80th Cong., 1st Sess. (1947), p. LXXVII [footnote added].

bill is aimed at taking care of the needs of all 11 states which would be crippled in the enforcement of their claims were this punitive damage provision not straightened out. The idea is, of course, that Kentucky, Missouri, Montana, Nevada, New Mexico, South Carolina, Texas, Virginia and West Virginia recognized by their statute and approved both compensatory and punitive damages. They can be recovered. So, in those states, they are crippled only halfway. There is only one of their legs cut off. But I think their situation ought to be recognized, and not simply that of Massachusetts and Alabama, where both legs are cut off.

By the Tort Claims Act, Congress has interdicted any resort to private bill. Therefore, we are remedyless, unless this provision is stricken one way or another, either specifically to correct the dire need of Alabama and Massachusetts, or in the broader way. So it does not make a bit of difference to us, gentlemen, which bill is adopted, so long as one is.

But I submit that to outlaw punitive damages is the height of asininity. The more great and venal the sin, there ought to be, certainly, no lessening by reason of that [p. 3] fact of the damages awarded for that sin.

I have talked to Mr. Monroney, the author of the bill in the House. I have talked to Mr. Celler, who is the author of the bill before it was adopted by the Reorganization Bill Committee. Both of them say, "Why, of course, we never had any idea of doing anything such as has been the result for both Massachusetts and Alabama."

These states, speaking through their courts of last resort, have said that it makes no difference whether a man is a ditch-digger or the president of the State University, he has a right to live, and anyone who slaughters him negligently and wrongfully ought to be mulct in damages for their wrong, for their sin. And

if it is compensable on the basis of a calculation of the earning capacity of the one slaughtered wrongfully, you put the premium on the amount of money that the dead man lost, and his family; instead of putting the premium on human life.

So, following that logic through a long line of decisions, Alabama and Massachusetts take the position, through their courts of last resort, that the purpose of this statute, which is called the Homicide Act, is to prevent unlawful taking of human life, no matter if it be a big man or a little man, so far as earning capacity is concerned. And we submit that if you can recover if you stump your toe and are laid off from work for a day, by the same token, if they kill [p. 4] you unlawfully there ought to be some payment and some balm in Gilead. There is not now.

MR. WALTER: Now, I notice in H.R. 3690 this language, that the compensation for injury, death, and so on, is in accordance with the law of the place where the act or omission occurred.

MR. HOBBS: That is right.

MR. WALTER: Is that not the law today?

MR. GWYNNE: The only difference, I believe, is to strike out the words "or for punitive damages."

MR. HOBBS: That is right. In other words, it is not that part of the law to which we object; but the fact that that is in there makes it subject to the Massachusetts and Alabama interpretation of their statutes, and it makes it so that for the other nine states it cut off one of their legs. It cut off both of ours.

May I say this before I close. We have a united Alabama delegation, of course, back of either of these bills that will effect this ultimate purpose. In addition to that, we have a united Massachusetts delegation, and at least one man who has expressed himself personally to me, who is vitally interested from the standpoint of

each of these other nine states. Our delegation is here, as you see, and each one of them would like to say something, but I think it is not necessary to have them testify.

[p. 5] Mr. WALTER: Two of the nine delegates are from Massachusetts.

Mr. GWYNNE: I am not clear just what the situation is in Massachusetts and Alabama. Do you mean that under their statutes recovery cannot be had for punitive damages for unlawful death?

Mr. HOBBS: No. No compensatory damages can be recovered, but only punitive. They take the position that human life is precious, no matter how humble that may be, to the person who indulges in the privilege of living, and that, therefore, you ought not to limit it to the amount of money that he might earn if he were allowed to live.

We take the position, which I think is the enlightened one, that no matter how humble, a man has a right to live, and that anyone who wrongfully deprives him of that should be held liable in damages.

Mr. GWYNNE: That is the law in your states?

Mr. HOBBS: That is the law in our states.

Mr. GWYNNE: How do you measure the damages?

Mr. HOBBS: The statute in Alabama says that the jury may award such damages as they think right. In Massachusetts it is "just and fair." I think. But in these other nine states they have substantially copied our language and compensatory damages are allowed for the loss of time and so on.

Mr. GWYNNE: In other words, recovery is possible in your [p. 6] state for wrongful death, but you do not make the distinction that is made in many jurisdictions between what might be said to be compensatory damages and punitive damages.

Mr. HOBBS: We specifically say that no compensatory damages can be recovered, but only punitive damages.

Mr. GWYNNE: Your statute calls that punitive damages?

Mr. HOBBS: Yes, sir. And I will insert in my extension of remarks the decision and quote from them. It is perfectly clear. And the same thing is true in Massachusetts.

Mr. GWYNNE: In other words, Mr. Hobbs, as I understand it, under this law, if suit were being tried against the Government for the wrongful death of an individual, the courts following your law could give no damage whatsoever for the wrongful death.

Mr. HOBBS: None at all—that is, under this Tort Claims Act.

Mr. GWYNNE: That is the situation in Massachusetts?

Mr. HOBBS: Yes.

Mr. GWYNNE: What is the situation in some of these other states—for instance, in Virginia?

Mr. HOBBS: In Virginia if a man is injured and laid up for a week, he can recover the compensatory damages. But if the jury says, "Well, that is a mere minor thing. But this is such a horrible case of negligence—they ran him down and killed him"—you can recover only the compensatory damages; [p. 7] but not a cent of punitive damages.

Now, the illustration—the proof of the pudding is in the eating—the first case in the United States has arisen in Alabama, where Judge John McDuffy wrote me that he had a demurrer there that he had to sustain because there was no possibility—by the way, he served here for 25 years and only missed being Speaker by three votes.

Mr. WALTER: I seconded his nomination.

Mr. HOBBS: I know you did.

He said there was no escape, under the law of Alabama, from having to knock that case into a cocked hat.

although it was one of the most horrible admitted cases of negligence. He is holding that up to see if we cannot give Alabama its day in court for death cases.

Mr. LANE: The wording of the three bills is different. Have you agreed on one bill?

Mr. HOBBS: It doesn't make any difference—either one of them—Mr. Grant's bill or mine.

Mr. GWYNNE: I wonder if I can say, for the benefit of the members who have come in, that the Celler bill is on an entirely different subject. I merely suggested that some of the witnesses might want to say a word about it.

Mr. HOBBS: How does that work out in your own state? In your state, that does not prevent a man from getting damages from a private individual, does it?

[p. 8] Mr. HOBBS: It eliminates the possibility of any proof as to how much money this poor devil that was killed wrongfully would have made. It says to the jury, and the Court charges under this law, the purpose of which was to prevent homicide, "The state takes the position that you and you alone, as the sole judges of the facts, should award such damages as you think fair and just."

STATEMENT OF THE HONORABLE ALBERT RAINS, REPRESENTATIVE FROM ALABAMA

Mr. RAINS: You say that the statute in Alabama says that the jury, under instruction from the Court, shall find such damages for the death as to them, in their good conscience, should seem right and just. Over the long years of rulings in the Supreme Court, they have so defined that to mean that all damages awarded in case of death are in the nature of punitive damages; and further, they accept another charge which says that no damage can be awarded except in the nature of a fine against the man.

Mr. WALTER: Is it not relevant to show what the decedent was earning?

Mr. RAINS: It is not. Under the Reorganization Act, and since the case is tried under the law where the death occurred, the Federal judge, of course, is obliged to rule on the demurrers to the effect that, since only punitive damages can be collected, and since he is dead, his earnings [p. 9] are not relevant.

Mr. WALTER: Are the Carlyle Tables relevant?

Mr. RAINS: No.

Mr. WALTER: The jury just reaches out into thin air and says, "This is the amount"?

Mr. RAINS: Yes.

Mr. HOBBS: The degree of culpability of the individual——

Mr. GWYNNE (interposing): Is not the difficulty that, I think the words "punitive damages" were probably used in a different sense than you have been using them in Alabama?

Mr. HOBBS: Yes, and it was a Simon Pure mistake.

Mr. BRYSON: The jury decides what it is to be, and that is what is given.

Mr. HOBBS: Yes.

Judge Alexander Holtzoff, before he was appointed judge, was the man charged by the Department of Justice with the briefing of this bill, and he has written several very informative articles on it, and in one of his treatises on it he discusses the very point that you had in mind in asking this last question.

When he was asked if the elimination of the punitive damage provision would work any hardship on the defendants, his reply was that many states, and more all the time, are coming into that field and had waived their immunity from suit, from punitive damages, and with no results that were [p. 10] adverse to the state. In other words, he thinks the jury renders the same ver-

diet conscientiously, no matter whether immunity is waived and punitive damages are recoverable or not.

Mr. GWYNNE: Is that all, Mr. Hobbs? You might put that in the record.

Mr. HOBBS: Yes.

Mr. GWYNNE: Mr. Grant!

STATEMENT OF THE HONORABLE GEORGE M. GRANT,
REPRESENTATIVE FROM ALABAMA

Mr. GRANT: Mr. Chairman and gentlemen of the Committee:

I had the Legislative Reference Service prepare a brief of the law in each of the 47 states, and I think it would be helpful to the Committee in considering this, and I would like leave to file this with the Committee.

Mr. GWYNNE: That will be filed.

* * * * *

[p. 11] Mr. GRANT: I might say that this was brought to my attention that some months ago a person was killed in my district, and, naturally, under the Legislative Reorganization Act of 1946—and I might say in passing that I dare say there is not a member of Congress who knew about this or thought about it at the time—and the attorney representing the estate filed a bill in the District Court, as provided in the Legislative Reorganization Act, and, of course, he finds himself out of court.

A few weeks after that the same thing happened in my district where there was an old colored man riding a mule down the road, and an Army truck left the highway, hit the mule and the old colored man and killed both of them. The Government paid for the mule, but the estate has no resort in collecting anything for the old man's death.

Mr. WALTER: Would the enactment of this make the states actionable for punitive damages?

Mr. GRANT: No. It is governed by the law of the state, and is so set out in the Reorganization Act.

Mr. WALTER: As I recall the Tort Act, the United States is relieved from punitive damages. I am just wondering whether or not—and after all, that was written in there for a purpose—I am wondering whether or not the enactment of either of these bills would increase the liability of the United States.

[p. 12] Mr. RAINS: It is limited only in any case where the law of the place where the act or omission occurred limited it. That was limited only to these states.

Mr. WALTER: But the Hobbs bill amends that. On Line 14, Page 2, after the comma, it states: "except that the United States shall not be liable for interest prior to judgment."

Under existing law, as I recall it, after "judgment" is contained this language, "or for punitive damages."

Mr. HOBBS: That is right.

Mr. WALTER: This amends it by striking out those four words.

Mr. HOBBS: That would make a general application and would increase the possible liability.

Mr. WALTER: Throughout the United States?

Mr. HOBBS: Throughout the United States, of the Government in every case, which I maintain is the righteous and the only way. The Government ought not to hide behind its immunity where the wrong was committed wantonly or wilfully, and that is what punitive damages are liable for.

Mr. GWYNNE: Is there not this distinction: Hasn't it been made in many cases, that punitive damages are meant to punish the person who did the wrong? Hasn't there been some limitation on punitive damages against corporations?

Mr. HOBBS: I do not think so.

Mr. WALTER: Yes, and employers.

[p. 13]. Mr. GWYNNE: In some cases they have restricted the right of recovery of punitive damages against a corporation, whereas they may be assessed against the individual.

Mr. HOBBS: So far as I know, I have never heard of any such doctrine or decision.

Mr. GWYNNE: Go ahead, Mr. Grant.

Mr. GRANT: Of course, the legislative Reorganization Act provides that the Government shall be liable under circumstances where a private person would be liable to the claimant for such damages in accordance with the law of the place where the act or omission occurred. Of course, my bill would not change that.

To bring this matter to the attention of the Committee and Congress, at the same time I filed H. R. 3668 I filed a private relief bill. Of course, I knew at that time that the Committee could not consider the bill and would have to turn it down. But, at the same time, I hoped that it could be filed and the Committee would do that to show that we were entitled to relief somewhere. But the Parliamentarian returned this bill to me and said I could not file it. I asked him if he could mark it "Not Filed," and he said, "No."

So that is where we stand. We cannot file a bill for relief—a private bill—because that is barred by the statute, and we are out of court when a bill is filed in the District Court where the act took place or the district in which the [p. 14] plaintiff resides. And, frankly, I do not believe it was the intention of Congress to bar citizens of the state of Alabama and the state of Massachusetts from having relief.

One might say that it is the state's fault. That might be true. But, at the same time, the Federal Government—we here in Congress—have changed the law, and

I believe the wrong has been done, and I trust that you gentlemen can report one of our bills out favorably.

Mr. GWYNNE: Are there any questions?

Who is the next witness?

Mr. HOBBS: As I have stated, the entire delegation is here and every one of them would like to be heard. There are several from Massachusetts. Mr. John McCormack and Mr. Philbin both spoke to me and I told them I did not think it was necessary for them to come. But they take the position very strongly that we have tried to indicate to you today.

Mr. GOODWIN: In connection with the legislation, Congressman Bates asked me to say that he could not come in and asked that he might be recorded as in favor of it.

I notice also that Congressman Heselton and Congressman Donohue are here, and Congressman Lane, of course.

Mr. GWYNNE: Would Congressman Heselton and Congressman Donohue like to say a few words?

STATEMENT OF THE HONORABLE HAROLD D. DONOHUE, REPRESENTATIVE FROM MASSACHUSETTS

[p. 15] Mr. DONOHUE: It might be interesting to the Committee, we have in Massachusetts a section of the law entitled "Chapter 229: Actions for Deaths and Injuries Resulting in Death."

I call your attention to Section 5, which reads as follows:

(Chapter 229, Section 5, General Laws of Massachusetts to be inserted at this point.)

Actions for Death and Injuries Resulting in Death.

GENERAL LAWS OF MASSACHUSETTS

CHAPTER 229

Section 5. Action for Death in General—Except as provided in sections one, two and three, a person who

by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by section four of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one. (1897, 416; 1898, 565; R. L. 171, #2; 1907, 375; 1922, 439; 1925, 346, #9).⁴⁴

* * * * *

[p. 16] Mr. Gwynne: Under the construction given that statute, if some agent of the Government killed someone wrongfully in Massachusetts could the estate recover?

Mr. DONOHUE: Not under the Federal Tort Claim Act, as it exists.

Mr. GWYNNE: Have you any cases?

Mr. DONOHUE: Yes. This section—the section I have just read, giving a right of action for death by negligence of one not in the defendant's employ or service conforms, in the main, to the policy of the Commonwealth respecting remedy for death, which is, in some aspects, punitive and in some aspects compensatory and remedial, and it cites *Putnam v. Savage*, 244 Mass.

⁴⁴ Note that this text of the Massachusetts Death Act does not contain any amendments subsequent to 1925, especially not the amendments of 1946 and 1947 under which the theory of recovery became compensatory. [Footnote added].

83, cited in 138 N.E. Report 808, 61 ALR 839, and it goes on to say:

"This is not recoverable under the section, but is a penalty to punish the wrongdoer. It is, in substance, a fine imposed by the Commonwealth for the offense of causing loss of human life through negligence, which, instead of being turned into the Treasury of the Commonwealth, is paid one-half to the widow and one-half to the minor children."

If there is no widow the whole amount goes to the next of kin.

Mr. GWYNNE: I had particular reference as to how your courts construed the Tort Claim Act.

Mr. DOXOHUE: We have not had the cases.

[p. 17] Mr. GWYNNE: But you think, in view of its decisions, they would probably hold the same as the court in Alabama has held?

Mr. DOXOHUE: I would say so. In fact, from these decisions that have come down, they have given the interpretation to that section of the law as being punitive in nature, and, in view of the wording of the Federal Tort Claims Act, the Federal Government, in the event that one of its employees caused the person to be killed up there, they just could not recover under the interpretation given our law.

Mr. GWYNNE: And you think that the bill introduced by Mr. Grant would remedy the peculiar situation in your states?

Mr. DOXOHUE: I regret to say that I have not read the bill.

Mr. GWYNNE: There are two bills here, and Mr. Grant's bill is the much shorter bill.

I presume, without any question, the Hobbs bill would remedy the situation in your state. Would the Grant bill also?

Mr. DOXOHUE: Provided, That, in any case where

the law of the place where the act or omission occurred has been construed to provide for only punitive damages in the event of wrongful death, the United States shall be liable for such damages."

According to these decisions our courts have construed it not only in the recovery to be punitive, but also [p. 18] compensatory.

Mr. GWYNNE: Any questions? Mr. Lane?

Mr. LANE: No, sir.

Mr. GWYNNE: Thank you, Mr. Donohue.

Are there any other witnesses here urging either one of the bills?

Mr. GOODWIN: Congressman Heseltun had to go and he said he would like to be recorded as in favor.

Mr. GWYNNE: Charles R. Clason of Massachusetts was not able to be here, but advises that he is in favor of the legislation and urges its enactment.

Mr. BAYNTON: The Department of Justice would like to offer testimony.

Mr. GWYNNE: Just a moment, please.

Mr. BAYNTON: I am sorry, sir.

Mr. GWYNNE: All right. We will hear you. Give your name to the reporter, please.

STATEMENT OF HAROLD L. BAYNTON, ESQ.

SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Mr. BAYNTON: I am Harold L. Baynton, Special Assistant to the Attorney General.

[p. 20] As to the other bills under consideration, H.R. 3668 and H.R. 3690, the Department has felt that it had to move for the dismissal in tort claims for death in the two states about which we have been talking—Alabama and Massachusetts.

Mr. WALTER: Why?

Mr. BAYNTON: Because we have felt that the purpose of the tort claims was to compensate those injured, rather than to punish the United States for the wrongdoing of the employee.

Mr. WALTER: After all, you are resorting to a technicality, the effect of which was to deprive a person of the compensation they would have gotten under the laws of the state.

Mr. BAYNTON: That is true.

Mr. WALTER: Do you think it is the duty of the United States to avail itself of all the technical objections that we members of the bar raise whenever we can?

Mr. BAYNTON: It is a little more than a technicality. You have a mandate from the Congress to allow the United [p. 21] States to be sued under certain circumstances. Would we not be remiss in our duty if we expanded that mandate.

Mr. WALTER: Are you asking me that question? The answer is "No." You owe a duty not only to the United States, but to the citizens of the United States. I do not think that any public official ought to take advantage of technicalities where a person is deprived of something they could get if they were in another forum.

Mr. BAYNTON: That is one of the reasons we think this Act should be amended.

According to the last information I had, there had been three cases in each of the states—three in Alabama and three in Massachusetts. To my knowledge, there has been no final action in any of them. It may be possible that one of the judges has granted a motion. I am not sure.

Of the two bills, we would favor H.R. 3668, the shorter bill, by Mr. Grant.

The punitive damages should be assessed, if the bar

against punitive damages were removed. In the Tort Claims Act it is a punishment, and the two states, by innumerable decisions, have held it to be a punishment to the wrongdoer. The wrongdoer in these accident cases is the Government employee. Other than whatever criminal punishment he may receive in an estate action against him if his act amounted to a crime—other than that, the punishment is imposed on [p. 22] the United States by the payment of money. And we feel that the theory of the Tort Claims Act was not that.

Mr. WALTER: Have appeals been taken in either of those cases?

Mr. BAYNTON: No. I do not believe any of them have been finally decided.

Mr. WALTER: I think the Court went away out of its way to sustain the demurrer, because, after all, it was the intention of the Congress to provide a remedy in accordance with the laws of the state in which the injury or death occurred. I think that was very clear. And for the Court to go on and interpret this punitive thing, which is entirely different, is to deprive a person of a right of action. I think it is very far fetched.

Mr. GRANT: I might say, in the case in Alabama in which Judge McDuffy had it under consideration, he has held it up for several weeks in an attempt to give an opportunity for Congress to amend the Act; and he recently stated that unless something is done pretty soon he would have to dismiss the action.

Mr. Gwynne: I think there is a great deal in what Mr. Walter says. I feel quite certain that Congress had no intention of writing a law which would bring about the peculiar situation which apparently exists.

Mr. Baynton, do you think the Grant bill would take care [p. 23] of the situation in Alabama and Massachusetts?

Mr. BAYNTON: I am sure it would.

Mr. GOODWIN: You think the Grant bill would, as well as the Hobbs bill?

Mr. BAYNTON: The Hobbs bill goes much further.

Mr. GOODWIN: But you think for Massachusetts the Grant bill would be all right?

Mr. BAYNTON: For both Massachusetts and Alabama.

Mr. GWYNNE: In Iowa we do differentiate between compensatory damages and punitive damages, and, under instructions from the Court, if certain things are found to exist punitive damages may be allowed to punish the wrongdoer.

Mr. BAYNTON: I suppose that is over and above any compensatory damages.

Mr. GWYNNE: That is correct.

The Hobbs bill would permit that to be considered.

Mr. BAYNTON: That is right.

Mr. GWYNNE: You believe that should not be done?

Mr. BAYNTON: I believe so. As I say, the history of the Tort Act grew out of a large number of cases which the Congress had to consider. To my knowledge, I do not believe any private bill included punitive damages at any time. It seems to me the attempt here was to allow the courts to consider the evidence and assess damages on approximately the same basis as Congress had in the past, which did not include [p. 24] punitive damages.

In the large amount of business we apparently lost track of the fact that two states were limited to punitive damages and when the bill became law they were, in effect, cut off.

The Grant bill would allow in those two states where only punitive damages are assessed, claimants against the United States to have their cases decided by the court, which would again put them on somewhat of an equal footing.

Mr. LANE: I would like to ask Mr. Hobbs, if I may,

if, in his opinion, the Grant bill would cover Massachusetts.

MR. GWYNNE: Mr. Hobbs, would you answer?

MR. HOBBS: Maybe I can give you the citation, which holds that while those damages which are awardable under the Massachusetts statute are purely punitive, yet they have elements in the nature of compensatory damages to a certain extent, which they delineate. To that extent, which is very minor, the Grant bill would cover Massachusetts. But I think it needs some amendment.

MR. GOODWIN: Your point, Mr. Hobbs, as I understand it, is that the Grant bill would only cover Massachusetts as to these compensatory elements.

MR. HOBBS: That is right, because the Grant bill says that where the Supreme Court of the State in question says that only punitive damages may be recovered, yet in one of the Massachusetts cases—the Houlihan case is the leading [p. 25] case—it says categorically that it is punitive damages. But in certain narrow circumstances there might be recovered compensatory damages or damages compensatory in their nature.

MR. GWYNNE: Does that answer your question, Mr. Lane?

MR. LANE: Yes.

MR. GWYNNE: All right, Mr. Baynton. Go ahead.

MR. BAYNTON: I have nothing more to add, unless I could answer some questions.

MR. GWYNNE: Do you know of any other difficulties in any other states that have arisen because of differences between the state law and the wording in the Tort Claims Act?

MR. BAYNTON: * * *

This Alabama-Massachusetts problem and the statute of limitations should properly, I think, be decided by

the courts, and, of course, there is the problem of handling all of these cases.

[p. 26] STATEMENT OF FR. GEORGE B. GALLOWAY,
SENIOR SPECIALIST IN LEGISLATIVE ORGANIZATION,
LEGISLATIVE RECORD SERVICE

DR. GALLOWAY: My name is George B. Galloway. I am the Senior Specialist in Legislative Organization at the Legislative Reference Service, and I came this morning at the invitation of the Clerk of the Committee, not expecting to testify.

[p. 29] DR. GALLOWAY: H. R. 3668 would make the United States liable for punitive damages, as I understand it, and, as previous testimony brought out, this particular amendment is designed to apply to situations that obtain in only two states—Alabama and Massachusetts. It has been suggested to me by Legislative Counsel that the proper solution for the problems that arise in the case of these two states is not to amend the Federal Tort Claims Act, but to change the laws in the two states concerned.

MR. GWYNNE: We could not do much about that.

DR. GALLOWAY: You could not do anything about that.

MR. LANE: And the legislature of Massachusetts would not do it.

DR. GALLOWAY: That is up to the legislatures of the two states.

MR. GWYNNE: When they wrote the Tort Claims Act, they did not know the statutes of each of the states.

DR. GALLOWAY: They sought to deal with the preponderant situation, and they were guided by the situation

as it obtained in 46 out of the 48 states. The proper remedy for the condition in the two states concerned is for them to amend their statutes, rather than amend the Federal statute and thus, perhaps, impair the situation in the other 46 states.

[p. 30] Mr. GOODWIN: Would not the Massachusetts legislature say, "It is Congress that has messed this thing up. Now, let Congress get us out of it"?

Dr. GALLOWAY: That is a policy question and I leave that to your decision. But I would like to add this comment on these bills, that it seems to me that it should be borne in mind what the effect of them will be, if one of these amendments is adopted, upon the Federal Treasury.

I am advised by counsel that the effect would be to take the United States for a ride and give rise to exorbitant demands for punitive damages. In this connection I would like to invite attention to the remarks of Congressman Scrivner, made on the floor of the House on the 2nd of April. Mr. Scrivner's remarks were extended in the record and appear in the Congressional Record for April 2, 1947, on Pages 3093 and 3094.

Mr. Scrivner warned of the development of exorbitant claims for damages against the United States and gave some statistics to support his apprehension.

With reference to H. R. 42, Mr. Chairman—

Mr. WALTER (interposing): Before you go on to that, I would like to ask, is your argument applicable to the Grant bill?

Dr. GALLOWAY: Well, I think it is applicable to both of these bills, in so far as they would, as I understand them, [p. 31] make the United States liable for punitive damages.

Mr. GWYNNE: The Grant bill would hardly do that in my state.

Mr. WALTER: It would only do it in two states.

Mr. GWYNNE: It imposes in Massachusetts and Alabama the same duties on the United States as it does on an individual in Massachusetts or Alabama.

Mr. GALLOWAY: I ought not to testify on that, not being a lawyer. I received this advice from Legislative Counsel who drew the Federal Tort Claims Act.

If I may now address my remarks to H. R. 42—

Mr. HOBBS (interposing): Mr. Chairman, may I say this: The records show that Massachusetts and Alabama are among six average award states in the nation; much less than the ones who award compensatory damages strictly. And, of course, we are not interested in the Celler bill.

[p. 32] Dr. GALLOWAY: That is correct. It was no part of the thought of the Joint Committee that the Federal Tort Claims Act would discriminate against any state.

Mr. LANE: In other words, it was never brought to the attention of the Select Committee and they had no idea at that time that this ever would happen.

Dr. GALLOWAY: That is correct.

Mr. WALTER: Is there a limitation of the amount that can be recovered in Massachusetts, of \$10,000.

Mr. LANE: Yes.

[p. 34] STATEMENT OF WILLIAM L. ELLIS, ESQ., ASSISTANT TO THE COMPTROLLER GENERAL

Mr. ELLIS: My name is W. L. Ellis, Assistant to the Comptroller General.

[p. 35] I have with me Mr. O. K. Blanchard, of the General Accounting Office.

We are here in response to the invitation of the Chairman of the Judiciary Committee in a letter received

day before yesterday, asking for someone to express the official views of the General Accounting Office. Those views can be expressed very briefly.

I have a memorandum prepared in the General Counsel's Office, which was reviewed carefully by the Comptroller General this morning and has his approval.

* * * * *

[p. 36] On H. R. 3668 and H. R. 3690, there seems to be no question but that an inequity has been proved with respect to the two states, and some action would be indicated to correct it in line with the general principle of the Tort Claims Act.

There is, however, a suggested criticism, that the approach in each case is subject to improvement, in this way: The first bill, H. R. 3668, allows punitive damages in those two states. The net result, it is suggested, is not to remove an inequity, but to continue an inequity, because it allows a different rule of law there than in the other 46 states.

The second bill corrects the situation by allowing punitive damages in all states. That is criticizable because there is no maximum limit in the Tort Claims Act, and it is thought to be, perhaps, an unjust burden on the taxpayers and the Treasury to charge them for punitive damages, in the sense that what the legislation was intended to do, as we understood it, was to carry out the policy which Congress had followed, namely, to compensate people who have been damaged by the Government's wrongdoing.

As a suggested amendment to H. R. 3668, we would offer this solution, namely, correct the inequity by removing the inequity. That is to say, do it in this way: Since in those two states compensatory damages are not allowed, all [p. 37] that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed.

Mr. GWYNNE: You have a suggested amendment?

Mr. ELLIS: Yes.

"Provided, that in any case where the law of the place where the act or omission occurred provides, or has been construed to provide, for only punitive damages in the event of wrongful death, the United States shall be liable for actual or compensatory damages in lieu thereof."

It is believed that that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly in accord with the general rules followed in the other 46 states, so far as we are in a position to understand.

Mr. LANE: The United States would not be liable to the same extent as other individuals in Massachusetts and Alabama, would it?

Mr. ELLIS: That is true; but that is true in the rest of the states also.

Mr. BLANCHARD: It would give Massachusetts and Alabama the same situation as now exists in other states.

Mr. ELLIS: That is correct.

Mr. WALTER: It is important, because when a jury thinks of a defendant as being the rich Uncle Sam there might be a strong temptation, if there is no limit or measure, to render [p. 38] a judgment in a much larger amount.

Mr. ELLIS: I believe there are no juries allowed in these cases.

Mr. WALTER: That is right.

Mr. ELLIS: But there is this element to consider with respect to juries: The judge is guided, in general, by the recovery otherwise allowed by juries, and you would have that problem anyway.

STATEMENT OF CAPTAIN CHESTER WARD,
OFFICE OF THE JUDGE ADVOCATE GENERAL
IN THE NAVY DEPARTMENT

Captain WARD: Mr. Chairman and members of the Committee: My name is Chester Ward. I am from the Office of the Judge Advocate General of the Navy Department.

[p. 40] Captain WARD: Although the Navy Department opposes both H. R. 3668 and H. R. 3690, I do not believe it would oppose the proposed change as suggested by the representative of the General Accounting Office. Our views on these two bills are exactly the same as those expressed by him—that is, we can see no reason, so far as the principle of the Tort Claims Act is concerned, to subject the United States to punitive damages throughout the entire country.

Mr. GWYNNE: In other words, your view is that actual damages should be paid in every state, and punitive damages should be paid in no state.

Captain WARD: That is it exactly, sir. And the Navy Department is gravely concerned by reason of the number of suits and the amount of money involved, which have already been filed under the Tort Claims Act. Over three million dollars of claims have already been filed with the Navy Department, and both of these bills would permit the amendment of actions already brought to include punitive damage elements. So the drain on the Treasury would be greatly increased if that were done.

Actually, the average amount of the suits now pending is over \$23,000, and we would consider it very unfortunate if the amount would be raised further to include punitive damages.

I would like to state, in addition to anything that has [p. 41] been said so far, that, so far as punishment of the actual wrongdoer is concerned, nothing in the Act passed by Congress has immunized the actual wrongdoer from punitive damages even in these two states, regardless of the Tort Claims Act. If the plaintiff or the claimant wanted to punish the wrongdoer, he could go after him personally and nothing in this Act would protect him even in Massachusetts or Alabama. And it is considered very doubtful whether the United States should be subjected to punishment when the malicious or wanton character of the act is not properly chargeable to the United States.

MR. LAYNE: I do not suppose a claimant would get very far in suing one of those enlisted men who was driving one of these trucks.

Captain WARD: You would have a local jury.

MR. WATKIN: He would get just as much from him as if he were driving a truck for the ABC Corporation.

MR. LANE: But the ABC Corporation is insured under the Compulsory Insurance Act.

[p. 43] MR. BRYSON: You feel that the approach by the representative of the General Accounting Office is the proper one?

Captain WARD: It is a very just and workable way of getting around it.

MR. BRYSON: We want to do right by Alabama and Massachusetts, but we do not want to give them a privileged status over the other states.

Captain WARD: That is our attitude exactly.

MR. G'WYNNE: Thank you very much.

With the exception of statements that have been referred to and which are to be filed, the hearings will be closed.